

### **REMARKS**

Applicant amended claims 1, 21, 62, 89, and 96, and added new claims 160-165 to further define Applicant's invention. Claims 160-165 read on Group I, Species B as defined by the Restriction Requirement dated February 13, 2004.

In the Office Action, the Examiner objected to claims 64, 77, 78, 82, 83, 85-93 as being dependent upon a rejected base claim, but being allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. In addition, the Examiner indicated that claims 2, 3, 9, 18-21, 24, 25, 28-36, 43, and 44 would be allowable if rewritten to overcome the objection set forth in the Office Action and included all of the limitations of the base claim and any intervening claims.

The Examiner objected to claims 1, 21, 89, and 96 for minor informalities. Applicant amended claims 1, 21, 89, and 96 as suggested by the Examiner. Applicant submits that the Examiner's objections have been overcome.

The Examiner rejected claims 1, 4-8, 10-17, 22, 23, 26, 27, 37-42, 45, 46, 48-50, 62, 63, 65-76, 79, 80, 84, 94-96, 99, 100, and 102-104 under 35 U.S.C. § 102(e) as being anticipated by U.S. Publication No. 2003/0135220 to Cauthen. Independent claims 1 and 62, as now amended, recite a guard with at least one disc space penetrating extension having first and second portions that each include a contact surface, "said contact surfaces of said first and second portions being pivotal about an axis that passes through at least a portion of the pathway to the disc space and the adjacent vertebral bodies."

Cauthen teaches an insertion instrument 10 having a pair of guides 16, 20 that pivot about articulating hinge 22. (Cauthen, page 2, paragraphs 33-34; Figs. 1-2). Guides 16, 20 pivot about an axis that lies outside the pathway leading to the disc space and adjacent vertebral bodies. (See, e.g., Cauthen, Figs. 1-2). Cauthen does not teach or suggest a guard as recited in independent claims 1 and 62.

The Examiner rejected claims 51-61 and 105-115 under 35 U.S.C. § 103(a) as being unpatentable over Cauthen in view of U.S. Publication No. 2004/0073309 to Bianchi et al.; and claims 24, 47, 81, 97, 98, and 101 under 35 U.S.C. § 103(a) as being unpatentable over Cauthen. Applicant submits that the rejections over claims 24, 47,

51-61, 81, 97, 98, 101, and 105-115 are rendered moot at least because they depend from an allowable independent claim, or claims dependent therefrom.

Applicant submits that independent claims 1 and 62 are patentable and that dependent claims 4-8, 10-17, 22-24, 26, 27, 37-42, 45-63, 65-76, 79-81, 84, 94-115 dependent from one of independent claims 1 and 62, or claims dependent therefrom, are patentable at least due to their dependency from an allowable independent claim.


In view of the foregoing remarks, it is respectfully submitted that the claims, as amended, are patentable. Therefore, it is requested that the Examiner reconsider the outstanding rejections in view of the preceding comments. Issuance of a timely Notice of Allowance of the claims is earnestly solicited.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-1066.

Respectfully submitted,

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